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Chong Kow v Kesavan Govindasamy

B HIGH COURT (KUALA LUMPUR) — SUIT NO D1–22–701 OF 1994
MOHD GHAZALI J
16 DECEMBER 2008

C *Contract — Collateral contract — Validity — Principal contract held to be void — Whether collateral contract (guarantee) also void*

D *Contract — Formation — Illegality — Passport used as security — Whether loan contract breached Passports Act 1966 — Whether consideration was unlawful — Whether Contracts Act 1950 had been breached — Passports Act 1996 s 12(1) — Contracts Act 1950 s 24*

E *Evidence — Documentary evidence — Admissibility of — Whether documents admissible — Whether proviso to s 73A(1) of the Evidence Act 1950 applicable — Evidence Act 1950 s 73A(1)*

F *Evidence — Documentary evidence — Loan agreement — Whether plaintiff's claims of loan backed by documentary evidence*

G The plaintiff, a housing developer, gave a friendly loan to one Hans Dieter ('Hans') on the promise that it would be repaid before mid September 1992. The defendant was alleged to be Hans' business partner and guarantor and issued to the plaintiff a post dated uncrossed cash cheque dated 1 September 1992. Hans defaulted and the cheque was subsequently dishonoured and the plaintiff claimed against the defendant after being unable to trace Hans. The defendant stated he had no knowledge of the friendly loan and the guarantee
H stating instead that he had issued the cheque as Hans had informed him that the plaintiff had taken possession of Hans' passport and would only release it on payment. This would have enabled Hans to go on a business trip as the defendant's representative and had issued a letter accordingly. At the trial, the plaintiff insisted that Hans' debt to him had been settled when the defendant
I issued the cheque to him and that the defendant never asked for the return of the said cheque. The cheque was prima facie evidence that the defendant owed the plaintiff money, as there was at no time, any stop payment instructions. He also said that he held Hans' passport as security for the debt. This was disputed by the defendant who said that he did not guarantee the

loan nor was the cheque in settlement of Hans' debt and that the cheque was only to guarantee Hans' return to Malaysia. The plaintiff attempted to introduce some letters written by Hans (ID4 and ID5) but the defendant challenged them stating that the maker should be present and that the loan could not be proved. The defendant also stated that it was the plaintiff's company that should have brought the claim as the money loaned was company property, that the agreement was void as it lacked consideration and that it was illegal for infringing the Passports Act 1966 ('the Act')and the Exchange Control Act 1953.

Held, dismissing the plaintiff's claim with costs:

(1) ID4 and ID5 were inadmissible as the alleged maker of these documents was not called. These documents were put in for identification but had not been proved. Further this was not a case where, the plaintiff could have resorted to the proviso to s 73A(1) of the Evidence Act 1950, and thus, these documents could not be termed as exhibits and hence did not form part of the record in this case (see para 35).

(2) The plaintiff failed to prove the existence of the alleged loan to Hans. The claim by the plaintiff that there was such a loan was not backed by documentary evidence. It was difficult for the court to accept that the plaintiff, being a businessman and who claimed that he was a housing developer would have the temerity to have loaned such a large sum of money to Hans, whom he knew only for a short period, without it being evidenced by the necessary documentation especially when it involved his company funds. (see para 36).

(3) The loan agreement between the plaintiff and Hans was an illegal contract as it was forbidden by law, has Hans passport was used security for the alleged loan. The said passport which was issued by the government of the Federal Republic of Germany fell within the contemplation of the word 'passport' in the Act and that the plaintiff was a person who, without lawful authority, had in his possession the said passport. The said passport was clearly not issued to the use of the plaintiff and he had committed an offence under s 12(1) of the Passports Act 1966. Where a transaction is tainted by unlawful consideration, a plaintiff is not entitled to relief in equity, because of the illegality of his own conduct (see paras 37–38).

(4) Section 24 of the Contracts Act 1950 provides that the consideration or object of an agreement is lawful unless it is forbidden by law or it is of such nature that, if permitted, would defeat the provisions of any law. Taking possession of the passport of another as security for a loan was

clearly forbidden by law. It followed that the alleged guarantee agreement between the plaintiff and the defendant which was hinged or collateral to the loan agreement were also unenforceable as the loan agreement between the plaintiff and Hans in itself was unenforceable. Both agreements, if any, were contaminated with illegality (see paras 39–40).

(5) There was no reason for the defendant to settle Hans debt as he never gave a guarantee to repay the alleged loan. There was no documentary proof of the plaintiff's allegation of the guarantee or that the cheque was given to repay a purported loan which Hans allegedly took from the plaintiff. There was no corroborative evidence to prove or link the said cheque to a repayment of the alleged loan. The defendant had given a plausible and credible explanation as to why the said cheque was given. Even if it were a guarantee, the said cheque also had become unenforceable as no rights could emanate to the plaintiff under the alleged guarantee agreement when the principal contract was in itself unenforceable. It followed from the essential collateral nature of a guarantee that if the principal transaction was defective, the surety would not be liable. If the principal agreement was unenforceable, the secondary or collateral agreement was also unenforceable and hence the plaintiff had no legal right to enforce any collateral agreement or arrangement which he may have had with the defendant (see paras 43).

[Bahasa Malaysia summary

Plaintif, seorang pemaju perumahan memberikan suatu pinjaman persahabatan kepada Hans Dieter ('Hans') atas janji bahawa ia akan dibayar sebelum pertengahan bulan September 1992. Defendan dikatakan merupakan rakan perniagaan Hans dan penjamin dan telah mengeluarkan kepada plaintif cek tunai lewat tarikh yang tidak berpalang bertarikh 1 September 1992. Hans gagal membayar balik dan cek tersebut kemudiannya telah menjadi tidak laku dan plaintif menuntut terhadap defendan selepas gagal mengesan Hans. Defendan menyatakan dia tidak mempunyai pengetahuan mengenai pinjaman persahabatan tersebut dan jaminan sebaliknya menyatakan dia telah mengeluarkan cek tersebut kerana Hans telah memberitahunya bahawa plaintif telah mengambil milikan pasport Hans dan akan hanya memberikannya jika dibayar. Ini akan membolehkan Hans membuat perjalanan perniagaan sebagai wakil defendan dan telah mengeluarkan surat dengan sewajarnya. Semasa perbicaraan, plaintif menegaskan bahawa hutang Hans kepadanya telah selesai apabila defendan memberikan cek kepadanya dan bahawa defendan tidak pernah meminta pengembalian cek tersebut. Cek tersebut adalah keterangan prima facie bahawa defendan berhutang wang dengan plaintif, kerana tidak pernah ada pada bila-bila masa, apa-apa perintah menghentikan bayaran. Dia juga

menyatakan bahawa dia memegang pasport Hans sebagai jaminan terhadap hutang tersebut. Ini dipertikaikan oleh defendan yang menyatakan bahawa dia tidak menjamin pinjaman tersebut atau memberikan cek sebagai penyelesaian hutang Hans dan bahawa cek tersebut adalah hanya sebagai menjamin kepulangan Hans ke Malaysia. Plaintif mencuba untuk mengemukakan beberapa surat yang ditulis oleh Hans (ID4 dan ID5) tetapi defendan mencabarnya dengan menyatakan bahawa pembuatnya harus hadir dan bahawa pinjaman tersebut tidak boleh dibuktikan. Defendan juga menyatakan bahawa ia adalah syarikat plaintif yang sepatutnya membuat tuntutan kerana wang yang dipinjamkan adalah harta syarikat dan bahawa pinjaman tersebut adalah batal kerana ia tidak mempunyai balasan dan ia adalah salah di sisi undang-undang kerana mencabuli Akta Pasport 1966 dan Akta Kawalan Pertukaran Wang 1953.

Diputuskan, menolak tuntutan plaintif dengan kos:

(1) ID4 dan ID5 tidak boleh diterima kerana pembuat dokumen-dokumen yang didakwa tidak dipanggil memberi keterangan. Dokumen-dokumen tersebut dikemukakan untuk pengenalpastian tetapi tidak dibuktikan. Selanjutnya, ini bukanlah kes di mana plaintif boleh menggunakan proviso kepada s 73A(1) Akta Keterangan 1950 dan oleh itu dokumen-dokumen ini tidak boleh dikatakan ekshibit dan oleh itu tidak boleh membentuk sebahagian rekod kes di dalam kes ini (lihat perenggan 35).

(2) Plaintif gagal membuktikan kewujudan pinjaman yang didakwa kepada Hans. Tuntutan oleh plaintif bahawa terdapat pinjaman tidak disokong oleh keterangan dokumentar. Ia adalah sukar bagi mahkamah menerima bahawa plaintif sebagai seorang ahli perniagaan dan seorang yang mendakwa dirinya adalah pemaju perumahan akan berani untuk memberikan pinjaman jumlah yang banyak kepada Hans, yang hanya dikenalinya bagi tempoh yang singkat, menurut keterangannya, tanpa dibuktikan oleh dokumen yang sepatutnya terutamanya apabila ia melibatkan wang syarikat (lihat perenggan 36).

(3) Perjanjian pinjaman di antara plaintif dan Hans adalah kontrak salah kerana ia dilarang oleh undang-undang, kerana pasport Hans digunakan sebagai jaminan. Pasport tersebut yang dikeluarkan oleh kerajaan Republik Persekutuan German terangkum di bawah maksud 'pasport' di dalam Akta tersebut dan bahawa plaintif adalah seorang yang, tanpa kuasa undang-undang, mempunyai milikan pasport tersebut. Pasport tersebut jelas tidak dikeluarkan untuk kegunaan plaintif dan dia telah melakukan satu kesalahan di bawah s 12(1) Akta Pasport 1966. Jika sesuatu transaksi dicemari oleh balasan yang tidak

A sah, plaintif tidak berhak untuk relief di bawah ekuiti, kerana ketidaksahan tindakannya sendiri (lihat perenggan 37–38).

(4) Seksyen 24 Akta Kontrak 1950 memperuntukkan bahawa balasan atau objek sesuatu perjanjian adalah sah kecuali ia dilarang oleh
B undang-undang dan sifatnya adalah di mana, jika dibenarkan, akan menggagalkan peruntukan apa-apa undang-undang. Mengambil milikan pasport seseorang sebagai jaminan untuk pinjaman jelas dilarang oleh undang-undang. Oleh itu jaminan perjanjian yang didakwa di antara plaintif dan defendan yang bergantung pada atau
C kolateral kepada perjanjian pinjaman adalah juga tidak boleh dikuatkuasakan kerana perjanjian pinjaman di antara plaintif dan Hans dengan sendirinya tidak boleh dikuatkuasakan. Kedua-dua perjanjian, jika ada, dicemari dengan ketidaksahan (lihat perenggan 39–40).

D (5) Tiada ada sebab untuk defendan menyelesaikan hutang Hans kerana dia tidak pernah memberikan jaminan untuk membayar balik pinjaman yang didakwa tersebut. Tidak terdapat bukti dokumentar mengenai dakwaan plaintif tentang jaminan atau bahawa cek tersebut diberikan untuk membayar balik pinjaman yang dimaksudkan yang dikatakan
E diambil oleh Hans daripada plaintif. Tidak ada keterangan sokongan untuk membuktikan atau menghubungkan cek tersebut dengan bayaran balik pinjaman yang didakwa. Defendan telah memberikan penjelasan yang munasabah dan boleh dipercayai tentang mengapa cek tersebut diberikan. Jika pun ia adalah jaminan, cek tersebut juga tidak
F boleh dikuatkuasakan kerana tidak ada hak yang timbul kepada plaintif di bawah perjanjian jaminan yang didakwa apabila kontrak utama itu sendiri tidak boleh dikuatkuasakan. Oleh itu daripada sifat kolateral penting jaminan bahawa jika transaksi utama adalah cacat, penjamin tidak akan bertanggungjawab. Jika perjanjian utama tidak boleh
G dikuatkuasakan, perjanjian kedua atau kolateral juga tidak boleh dikuatkuasakan dan oleh itu plaintif tidak mempunyai hak di bawah undang-undang untuk menguatkuasakan apa-apa perjanjian kolateral atau aturan yang dia mungkin telah buat dengan defendan (lihat perenggan 43).]

H **Notes**

For cases on admissibility of documentary evidence, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1090–1274.

For cases on collateral contract generally, see 3(1) *Mallal's Digest* (4th Ed,
I 2006 Reissue) paras 2985–2994.

For cases on documentary evidence generally, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1090–1274.

For cases on formation of the contract generally, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3605–3741.

Cases referred to

Cope v Rowlands (1836) 2 M & W 149 (refd)
Eldridge and Morris v Taylor [1931] 2 KB 416, CA (refd)
Lim Kar Bee v Duofortis Properties (M) Sdn Bhd [1992] 2 MLJ 281; [1992] 3 CLJ 1667, SC (refd)
Ng Siew San v Menaka [1973] 2 MLJ 154, FC (refd)

Legislation referred to

Bills of Exchange Act 1949 ss 2, 13(2), 27, 27(1)(a), (b), 29(2), 30(2), 73
Contracts Act 1950 ss 24, 24(a), (b), (e), 25, 26
Evidence Act 1950 s 73A, 73A(1)
Exchange Control Act 1953 s 4(1)
Passports Act 1966 ss 1A, 12(1), 12(1)(f)

V Manokaran (Jasmeet Pal Singh with him) (Wan Majid, Mano & Nada) for the plaintiff. [Note: CN Rajan & Co took over from Wan Majid, Mano & Nada from 2 September 2004]
P Arjan (Sri Ram & Co) for the defendants.

Mohd Ghazali (now JCA):

[1] The plaintiff's claim against the defendant is as follows:

(a) that on or about 20 January 1992 he gave a friendly loan of RM270,000 to one Hans Dieter, a German national ('Hans') on the promise that the latter will repay the loan before mid-September 1992;

(b) that on 30 July 1992 Hans made a part payment of RM7,000, hence leaving a balance of RM263,000 ('the said sum');

(c) to guarantee that the said sum will be repaid, the defendant, an acquaintance of Hans issued to the plaintiff a Standard Chartered Bank post-dated uncrossed cash cheque No 357286 dated September 1992 ('the said cheque') (exh P6) for the said sum;

(d) it was agreed among the parties that the said cheque will be banked in only in mid-September 1992;

(e) that Hans defaulted and hence the plaintiff banked in the said cheque; it was dishonoured; and

(f) that as the plaintiff was unable to trace Hans, he demanded the said sum from the defendant but met with no response.

[2] By letter dated 13 June 1994 (exh P8), Messrs Wan Majid & Mano, the plaintiff's solicitors wrote to the defendant as follows:

Re: Dishonoured Cheque No 357286 for RM263,000.00.

We act for Chong Kow of 71 A, Jalan Chung Thye Phim, Ipoh Perak Darul Ridzuan.

We have been informed by our client that you have issued a cheque No 357286 for RM263,000.00 as security for and on behalf of Hans Dieter.

We have been further informed by our client that the said Hans Dieter has to date failed and/or refused to pay the said sum of RM263,000.00 or any part thereof.

We have been further informed by our client that the said cheque was dishonoured by the Bank with instructions it exceeds the arrangement.

We are now instructed by our client to demand from you the said sum of RM263,000.00. TAKE NOTICE that you are required to remit payment for the said sum of RM263,000.00 plus our legal cost of RM100.00 being cost of this notice within 7 days from date hereof failing which we have firm instructions from our client to institute legal proceedings against you for the recovery of the same in which event you will be liable for further cost and expenses incurred therewith.

We hope this course of action will not be necessary.

(Emphasis added).

[3] Vide this suit, the plaintiff is claiming from the defendant the said sum with interest at 8%pa from the date of default until full settlement and costs.

[4] The defendant denied having any knowledge of the friendly loan and further denied that he promised to pay the said sum which was allegedly due and owing from Hans. His defence is as follows:

(a) he became acquainted with Hans in the early part of 1992; in the course of his business, Hans agreed to go on a business trip to Mauritius as his representative on or about 1 August 1992;

(b) prior to a second business trip to Mauritius as his representative scheduled for 19 August 1992, Hans informed him that he could not travel as his passport was with the plaintiff; Hans also informed him that the plaintiff had cheated him and that the plaintiff had taken possession of his passport ('the said passport') by force and demanded the said sum for its release;

(c) to avoid any consequential loss which would have arisen if the trip to Mauritius was cancelled and acting on 'the faith and truth of the said factual representations', he issued the said cheque at the request of Hans as he was compelled to assist Hans in getting back the said passport; Hans requested for the said cheque for the predominant purpose of obtaining the release of the said passport which was then in the hands of the plaintiff by representing that the said cheque was not intended as payment to the plaintiff for the said sum;

(d) he issued the said cheque together with a covering letter addressed to the plaintiff stating that the cheque was issued to secure the release of the said passport and that the cheque has to be returned to him upon Hans' return to Malaysia on or before 1 September 1992; the plaintiff then returned the said passport to Hans thus enabling him to make the trip to Mauritius as planned;

(e) upon Hans' return from Mauritius, he used his best endeavours to obtain the said cheque from the plaintiff but to no avail; the plaintiff later informed him that he no longer intended to pursue the matter with Hans as he had obtained once again the said passport;

(f) notwithstanding the earlier understanding between the parties, the plaintiff presented the said cheque for payment when the same was never intended and is now wrongfully alleging that he had guaranteed payment of the said sum.

THE TRIAL

[5] In his evidence, the plaintiff, who claimed that he was a housing developer, stated that he met Hans in the course of business sometime in 1990/1991. Hans later introduced him to the defendant whom Hans claimed was his partner. Sometime in January 1992, Hans, whose office was then located in the defendant's office, borrowed from him a sum of US$100,000 which was then equivalent to RM270,000 and promised that he will settle the loan in September 1992. He later corrected himself and stated that he gave the loan in Ringgit Malaysia. In relation to this, he testified as follows:

> I gave it to him in Ringgit Malaysia. This money belong to the company and because he wants to borrow, I took it out from the company and loaned him. What I mean is the money was about to be banked into the company, but because he wanted to borrow, it was not banked in. It was my personal loan to him. I loaned the money because he said he had a lot of projects and wanted to introduce to me.
>
> I did not charge any interest. *It was a friendly loan. He promised to return the money in the month of September 1992.I wanted him to sign but he did not want to sign. As he says he is a foreigner he will give his passport to me to hold. He gave me his passport for me to hold.*
>
> (Emphasis added.)

[6] The plaintiff then stated that sometime in August 1992, Hans and the defendant met him and handed the said cheque which was dated 1 September 1992. The defendant told him to cash the said cheque in the third week of September 1992. He then insisted that the defendant settle Hans' debt and thus, on receiving the said cheque he returned the said passport to Hans. He further said that he would not have returned the said passport but for the said cheque.

A [7] When the said cheque was dishonoured, he went to see the defendant who informed him that he will look for Hans. After waiting for two years, and seeing no further development, he filed this suit against the defendant.

B [8] The plaintiff insisted that Hans' debt to him was settled when the defendant presented the said cheque to him. He testified that Hans came together with the defendant and handed to him the said cheque. He also insisted that the defendant never requested for the return of the said cheque at any time. He denied having ever informed the defendant that he no longer needed the cheque as the said passport was back in his possession. In relation C to this, he testified as follows:

> When I got P6 (ie, the said cheque) I returned the passport to Hans Dieter. After I recovered this cheque, Hans owe me no more money. I would not return the passport if he did not give me this cheque.

D

[9] Under cross-examination, the plaintiff denied that he was a moneylender. In relation to the said passport, the minutes of the proceedings read:

E Q: What security did you get for disbursement of the loan?

A: He said he will let me hold his passport.

Q: The passport was held by you as security?

F A: When I loaned the money to him he asked me to hold his passport as security so that he will not run away.

Q: What other guarantee did Hans give you when you gave the loan?

A: Nothing.

G Q: What consideration did you get for the loan that you gave to Hans Dieter?

A: I let him have this loan because he has projects to give me in the future.

Q: Were any project given to you by Hans?

A: No.

H Put: You inform us you hold the passport as security. You had no lawful authority to hold the passport as security.

A: He let me hold the passport because to secure that he will not run away.

Q: When did you return his passport to him?

I A: When Mr Hans came with the defendant to see me, he gave the cheque and then I returned the passport. I cannot remember when.

[10] In his evidence, the defendant claimed that he was the managing director of a company named Shri Dhaya Holdings Sdn Bhd which was also in the business of property development. Sometime in March/April 1992 he agreed to allow Hans to use his office facilities. Hans got him interested in doing housing development in Mauritius.

[11] He could not locate Hans since 1993 or 1994. He denied that he gave the said cheque, which was his personal cheque, to guarantee for any payment for loans taken by Hans. He also denied that he gave the said cheque in full settlement of the loan taken by Hans.

[12] In the course of the trial, the plaintiff attempted to introduce the following documents allegedly written or prepared by Hans, namely:

(i) an undated typewritten letter (marked as ID4) from Hans to the plaintiff wherein Hans apologiSed for delaying the return of the sum borrowed and undertook to return the said sum within seven days of the letter; in the same letter, there was also a handwritten note allegedly written by Hans dated 20 July 1992 wherein Hans promised to return the sum of US$20,000 within the week and the balance within six months; and

(ii) a statement allegedly written by Hans confirming that he owed the plaintiff RM270,000 and that he had paid RM7,000 on 30 July 1992 and that he owed a balance of RM263,000 (marked as ID5).

The defendant objected to the production of the above documents on the basis that the maker must be called. I had reserved my ruling on the admissibility of ID4 and ID5.

[13] Going on the assumption that Hans took a loan from the plaintiff and that the balance outstanding is the said sum, what is blatant is that the plaintiff took possession of the said passport as security for the loan. In his evidence the defendant testified that Hans could not travel to Mauritius at the material time on a business trip as his representative as the said passport was in the possession of the plaintiff and that the plaintiff only agreed to release the said passport when Hans handed to him the said cheque.

[14] It is the plaintiff's claim that the said cheque was for the settlement of the loan whereas the defendant averred that it was only meant to be security and that the understanding between them was that the said cheque should not be presented for payment on its due date and that it was to be returned to him when Hans surrender his passport to the plaintiff upon his return from Mauritius.

A THE PLAINTIFF'S SUBMISSION

[15] Learned counsel for the plaintiff pointed out that the case revolves around the significance of a cash cheque which when presented for payment, was dishonoured. He argued that there was no stop payment instruction on the cheque, nor was there any documentary evidence adduced showing the terms and conditions, if any, that governed the use of the said cheque and under the circumstances, the said cheque is prima facie evidence that the defendant owes the plaintiff the sum of RM263,000 and hence the onus of proving otherwise shifts to the defendant.

[16] Counsel submitted that the said cheque was a regular cheque and payment was not stopped. As such the bank has to honour the said cheque if there are sufficient funds in the defendant's account to cover the cheque. On the facts, the bank returned the said cheque with the words 'exceeds arrangement' as is usual banking practice when there is insufficient money in the account to cover the cheque.

[17] Counsel pointed out that the defendant personally delivered the said cheque to the plaintiff as full and final settlement of the loan taken by Hans. Consequently, he argued that if the defendant's claim that the said cheque would be returned upon Hans return to Malaysia from Mauritius and therefore the said cheque was to guarantee that event, then the alleged guarantee is in no way related to the loan transaction but it guarantees the return of Hans to Malaysia only. Further, Hans did return to Malaysia and if the said cheque was in fact a guarantee of that fact only, why was payment not stopped?

[18] Counsel then contended a stop payment instruction by the defendant would be the best corroborative evidence of the alleged guarantee as it would show that the said cheque was not meant to be cashed as it had already served its purpose which was to ensure Hans return to Malaysia.

[19] In relation to the said passport, counsel argued that it was not the consideration for the loan agreement but was only the security document and that any defect in a security document or documentation will not invalidate a loan agreement. He further submitted that the said passport is nothing more than a form of security for the due performance of the loan and as such if there is any taint of illegality to the passport being held as security, it does not affect the loan agreement as such.

[20] With regards to ID4 and ID5 counsel argued that the provision of s 73A of the Evidence Act 1950 would apply and that these documents should be marked as P4 an P5 respectively; these documents would further

prove the existence of the loan. Under the above circumstances he urged the court that the plaintiff's claim be allowed with costs.

THE DEFENDANT'S SUBMISSION

[21] Learned counsel for the defendant argued that the plaintiff's entire claim is devoid of any documentary evidence substantiating the existence of the loan and/or that the loan was disbursed. He submitted that it is pertinent to note that according to the plaintiff's testimony, the alleged loan was given in January 1992 and para 3 of his statement of claim stated that the alleged loan was given to Hans on 20 January 1992; however, both ID4 and ID5 are dated 20 July 1992 and 30 July 1992 respectively which is some seven months after the alleged loan. Thus, there are no contemporaneous documents evidencing the loan to Hans. Further, there was no opportunity for the defendant to cross-examine the maker of ID4 and ID5 to verify its authenticity.

[22] Counsel then submitted that if the loan cannot be proved in the first place, then the plaintiff's assertion that the said cheque was given as repayment for the loan is unsustainable.

[23] Counsel further argued that the plaintiff has no 'locus standi' to bring this suit against the defendant. In relation to this he canvassed the following arguments:

(a) in his statement of claim the plaintiff averred that the money was his and that it was a friendly loan given by him to Hans;

(b) in examination-in-chief, the plaintiff said that the money belonged to his company named Chong Yik Development Sdn Bhd and that he loaned the money to Hans before it was banked in into the company's account;

(c) under the circumstances, only the company has the legal right to bring this action; there is nothing to show that the money was an advance from the company to the plaintiff neither has the plaintiff preferred any evidence to substantiate this evidence.

[24] Counsel then argued that the alleged loan agreement between the plaintiff and Hans is without consideration and therefore void. He referred to s 26 of the Contracts Act 1950 which states that an agreement made without consideration is void. Alternatively, if the court finds there is consideration, that consideration contravenes s 24(a) and/or (b) and/or (e) of the Contracts Act 1950. With regards to this, counsel argued that the alleged loan agreement, ie, the alleged principal agreement purportedly between the

plaintiff and Hans is an illegal contract as it is forbidden by law, is opposed to public policy and it is of such a nature that, if permitted, it would defeat the law as it impinges or contravenes s 12(1)(f) of the Passports Act 1996 since the alleged loan which was given by the plaintiff to Hans was secured by the said passport. As the passport was security for the loan, this kind of agreement or arrangement would be prohibited as it infringes the Passports Act.

[25] Counsel subsequently submitted that the plaintiff had also contravened s 4(1) of the Exchange Control Act 1953 as the plaintiff allegedly loaned Hans in US Dollars, which is prohibited unless the plaintiff is a 'dealer' as defined by the Exchange Control Act 1953, which the plaintiff is not, or alternatively, permission had been obtained from the controller under s 4(1) of the same Act.

[26] Counsel also submitted that the principal agreement, ie, the alleged loan agreement between the plaintiff and Hans is in itself tainted by illegality and is rendered unenforceable and consequently would also be unenforceable against the surety, ie, the defendant as the said cheque was said to guarantee the repayment of the alleged loan purportedly given by the plaintiff to Hans.

THE BILLS OF EXCHANGE ACT 1949

[27] The Bills of Exchange Act 1949 ('the Act') is an Act relating to cheques in this country. Section 73 of the Act provides that a cheque is a bill of exchange drawn on a banker payable on demand. Section 2 of the Act provides the word 'bill' means a bill of exchange and the word 'holder' means the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof and that the word 'bearer' means the person in possession of a bill or note which is payable to bearer. Section 13(2) of the Act provides 'A bill is not invalid by reason only that it is antedated or postdated, or that it bears date on a Sunday'.

[28] Section 27 of the Act provides valuable consideration for a bill may be constituted by (a) any consideration sufficient to support a simple contract (b) an antecedent debt or liability; such a debt or liability is deemed valuable consideration whether the bill is payable on demand or at a future time.

[29] Section 29(2) of the Act reads:

> In particular the title of a person who negotiates a bill is defective within the meaning of this Act when he obtained the bill, or the acceptance thereof, by fraud, duress, or force and fear, or other unlawful means, or *for an illegal consideration*, or

when he negotiates it in breach of faith, or under such circumstances as amount to a fraud. A

(Emphasis added.)

[30] Section 30(2) of the Act reads: B

Every holder of a bill is prima facie deemed to be a holder in due course; but if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or *illegality*, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or *illegality*, value has in good faith been given for the bill. C

(Emphasis added.)

[31] In the instant case, it is not disputed that the said cheque was a postdated cheque, ie, it is a cheque which becomes a cheque payable on demand as soon as that future date is reached. D

THE CONTRACTS ACT 1950

[32] Section 24 of the Contracts Acts 1950 ('the Contracts Act') provides as follows: E

The consideration or object of an agreement is lawful, unless —

(a) *it is forbidden by a law;* F

(b) *it is of such a nature that, if permitted, it would defeat any law;*

(c) it involves or implies injury to the person or property of another; or

(d) *the court regards it as immoral, or opposed to public policy.*

In each of the above cases, the consideration or object of an agreement is said to be unlawful. *Every agreement of which the object or consideration is unlawful is void.* G

(Emphasis added.)

H

[33] Section 25 of the Contracts Act 1950 provides as follows:

If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void. I

THE PASSPORTS ACT

[34] Section 1A of the Passports Act 1966 reads:

> 'passport' means a valid passport which has been issued to a person by or on behalf of the Government of which he is a subject or citizen and includes any form of valid document of identity issued for the purpose of travel by any Government and recognized as a travel document by the Government of Malaysia.

Section 12(1) of the Passports Act 1966 provides as follows:

> Any person who —
>
> (f) without lawful authority, has in his possession any passport or internal travel document issued for the use of some person other than himself;
>
> shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding five years or to both.

JUDGMENT

[35] With regards to the documents marked ID4 and ID5, I am of the view that they are inadmissible as the alleged maker of these documents, ie, Hans was not called. These documents were put in for identification but have not in fact been proved. The plaintiff has not proved that Hans is dead, or unfit by reason of his bodily or mental condition to attend as a witness, or if he is beyond the seas and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to find him have been made without success. If that was such the case, the plaintiff could have resorted to the proviso to s 73A(1) of the Evidence Act 1950, but this was not the case and thus, these documents cannot be termed as exhibits and hence do not form part of the record in this case. I would rule them to be inadmissible evidence.

[36] It is my finding that the plaintiff has failed to prove the existence of the alleged loan to Hans. The claim by the plaintiff that there was such a loan is not backed by documentary evidence. I find it difficult to accept that the plaintiff, being a businessman and who claimed that he was a housing developer would have the temerity to have loaned such a large sum of money to Hans, whom he had come to know only for a short period, according to his evidence, without it being evidenced by the necessary documentation especially when it involved his company funds. To overcome this, the plaintiff had subsequently insisted that it was a personal loan from him and that he had accepted the said passport as security for the loan.

[37] Even if I am wrong on finding that the plaintiff failed to prove the existence of the loan, on the assumption that such a loan was given and does exist, it is my view that the loan agreement between the plaintiff and Hans is an illegal contract as it is forbidden by law. The said passport was used as security for the alleged loan. Thus, the question which need to be determined is whether the plaintiff had acted unlawfully when he took into his possession the said passport as security for the loan. What is clear from the provisions of the Passports Act 1966, as reproduced above, is that the said passport which was issued by the government of the Federal Republic of Germany falls within the contemplation of the word 'passport' in the Passports Act 1966 and that the plaintiff would be a person who, without lawful authority, had in his possession the said passport. The said passport was clearly not issued to the use of the plaintiff. The plaintiff had kept it as a security for the said loan, ie, unless Hans paid him the said sum due under the loan he would keep the said passport.

[38] I have also noted that the plaintiff never pleaded the fact that he had taken possession of the said passport as security for the loan. This fact only surfaced during the course of the trial. In his evidence, the plaintiff admitted that as consideration for the alleged loan to Hans he obtained the said passport as security. I would infer that if Hans did not pay back the loan, the plaintiff would not return the said passport to him. The plaintiff clearly has no lawful authority to have in his possession the said passport. He would on the face of it have committed an offence under s 12(1) of the Passports Act 1966. It is trite that where a transaction is tainted by unlawful consideration, a plaintiff is not entitled to relief in equity, because of the illegality of his own conduct.

[39] Section 24 of the Contracts Act 1950 provides that the consideration or object of an agreement is lawful unless it is forbidden by law or it is of such nature that, if permitted, it would defeat the provisions of any law. Taking possession of the passport of another as security for a loan is clearly forbidden by law and would surely defeat s 12(1) of the Passports Act 1966. In *Ng Siew San v Menaka* [1973] 2 MLJ 154 at p 157, in dealing with an agreement forbidden by law, Azmi LP referred to *Cope v Rowlands* (1836) 2 M & W 149; he said:

> The principle is clearly stated by Parke B in *Cope v Rowlands* in the following words:
>
> It is perfectly settled that where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute, though the statute inflicts a penalty only, because such a penalty implies a prohibition. And it may be safely laid down, notwithstanding some dicta apparently to the contrary, that, if the contract be

A rendered illegal, it can make no difference in point of law whether the statute which makes it so has in view the protection of the revenue or any other object. The sole question is whether the statute means to prohibit the contract.

B **[40]** I am of the view that entering into an agreement under the circumstances of this instant case would clearly contravene the Passports Act if a passport of the borrower is used as security. To allow the alleged loan agreement to stand would defeat the law as envisaged or provided under s 12(1)(f) of the Passports Act 1966. It would also be opposed to public policy. That being the position, it will necessarily follow that the alleged C guarantee agreement between the plaintiff and the defendant which is hinged or collateral to the loan agreement would also be in my view be unenforceable as the loan agreement between the plaintiff and Hans in itself is unenforceable. Both agreements, if any, would be contaminated with illegality. In *Lim Kar Bee v Duofortis Properties (M) Sdn Bhd* [1992] 2 MLJ D 281; [1992] 3 CLJ 1667, Peh Swee Chin SCJ said (at p 288 (MLJ) and p 1673 (CLJ)):

> Courts have always set their face against illegality in any contract. It is very well settled that the courts take judicial notice of such illegality and refuse to enforce E the contract and such judicial notice may be taken at any stage, either at the court of first instance or at the appellate stage irrespective of whether illegality is pleaded or not where the contract is ex facie illegal.
>
> When the contract is not ex facie illegal, then on the question of pleadings, there is only one situation where illegality need not be pleaded when the court can still F take judicial notice of the illegality and refuse to enforce it. The situation is when facts which have not been pleaded emerge in evidence in the course of trial showing clearly the illegality eg the illegal purpose of the contract, or its illegal consideration, with the presence of all relevant circumstances ...

G **[41]** Section 24 of the Contracts Act 1950 stipulates that, 'every agreement of which the object or consideration is unlawful is void'. Even if we take the view that the consideration flowing or moving from the plaintiff to Hans, ie the loan, is lawful, the consideration from Hans to the plaintiff ie the giving of the said passport as security for the loan infringes an express provision of H a statute and thus becomes unlawful. Such an agreement which is tainted by illegality ought not to be enforced.

[42] In relation to the said cheque, it is the defendant's case that to avoid any consequential loss which would have arisen if Hans' trip to Mauritius as I his representative was cancelled, he had to assist Hans in getting back the said passport from the plaintiff and thus, at the request of Hans he issued the said cheque to the plaintiff to secure the release of the passport on the understanding that the cheque would not be cashed and that it will be returned upon Hans return from Mauritius on or before 1 September 1992.

On the other hand, the plaintiff alleged that the defendant had guaranteed payment of the said sum and that the said cheque was used to settle the said sum.

[43] I have no reason not to disbelieve the defendant. There was no reason for him to settle Hans' debt. I would accept his contention that he never gave a guarantee to repay the alleged loan from the plaintiff to Hans. Further, there is no documentary proof of the plaintiff's allegation that there was such a guarantee or that the cheque was given for the sole purpose of repaying a purported loan which Hans allegedly took from the plaintiff. There is no corroborative evidence to prove or link the said cheque to a repayment of the alleged loan. The defendant on the other hand has given a plausible and credible explanation as to why the said cheque was given. Even if at all it was a guarantee, the said cheque which the plaintiff claimed was given by the defendant to him to repay Hans' loan also becomes unenforceable as no rights can emanate to the plaintiff under the alleged guarantee agreement when the principal contract is in itself unenforceable. It follows from the essential collateral nature of a guarantee that if the principal transaction is defective, the surety will not be liable (see *Eldridge and Morris v Taylor* [1931] 2 KB 416). If the principal agreement is unenforceable, the secondary or collateral agreement is also unenforceable and hence the plaintiff has no legal right to enforce any collateral agreement or arrangement which he may have had with the defendant.

[44] I find it difficult to believe that the loan was never reduced in writing considering that the amount involved was large and further the plaintiff hardly knew Hans. The loan was given to Hans without getting or securing any acknowledgement or proof that Hans had taken the money. The plaintiff received no other consideration or security for the alleged loan except Hans' passport.

[45] I would agree with the submission of learned counsel for the defendant that the alleged loan agreement between the plaintiff and Hans is an illegal contract as it is forbidden by law, is opposed to public policy and it is of such a nature that, if permitted, would defeat the law. In other words, consideration is unlawful if it is forbidden by law, or is of such a nature that, if permitted, would defeat the provisions of any law or is immoral or opposed to public policy. Unlawful consideration is a defence against the plaintiff. Consideration opposed to public policy is illegal, and contracts founded on them are condemned by law. An agreement to be at variance with public interest it is said, must be clearly and indubitably in contravention of public policy. Bills of exchange founded on such consideration are of no validity between the parties.

A **[46]** I do not intend to deal with the defendant's submission relating to s 4(1) of the Exchange Control Act 1953 and the question of locus standi as I find they are non-issues.

B **[47]** For the reasons aforesaid I would dismiss the plaintiff's case against the defendant with costs to be taxed.

Plaintiff's claim dismissed with costs.

C Reported by Kenny Chew Phye Ken

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